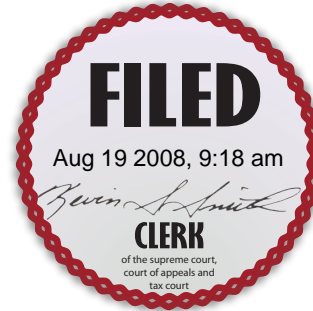


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

IN RE THE TERMINATION OF THE)
PARENT-CHILD RELATIONSHIP)
OF B.L., minor child, and MARY LaROSE,)
his mother, and WALTER LOGAN, his father,)

MARY LaROSE and WALTER LOGAN,)

Appellants-Respondents,)

vs.)

HOWARD COUNTY DEPARTMENT OF)
CHILD SERVICES,)

Appellee-Petitioner.)

No. 34A02-0804-JV-370

APPEAL FROM THE HOWARD CIRCUIT COURT
The Honorable Lynn Murray, Judge
No. 34C01-0708-JT-17

August 19, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellants-respondents Mary LaRose and Walter Logan (collectively, the parents) appeal the trial court's order terminating their respective parental relationships with their child, B.L. The parents argue that the evidence is insufficient to support the termination order and that Walter's due process rights were violated because he allegedly did not have notice of the initiation of the underlying proceedings declaring B.L. a Child in Need of Services (CHINS) and because appellee-petitioner Howard County Department of Child Services (DCS) allegedly refused to offer him services to better himself as a parent. Finding no error, we affirm.

FACTS

On May 1, 2003, Walter was arrested and incarcerated on a charge of class B felony dealing in cocaine. On September 24, 2003, Walter was convicted and sentenced to a six-year executed sentence with the Department of Correction (DOC). Walter and Mary were married in October 2003.

B.L. was born on September 23, 2003, and shortly after his birth, he tested positive for cocaine and opiates. As a result of the drug test, DCS contacted Mary, who entered into a Service Referral Agreement (SRA) requiring her to participate in certain services and parenting classes. The goals of the SRA were not fully met, but the agreement eventually expired, apparently because at that time B.L. was living with someone other than Mary.

On July 9, 2005, Mary left B.L. in the care of a friend, saying that she was going to run an errand and would return within a few minutes later. Approximately seven hours later, Mary's friend called emergency services after B.L. had ingested some of her prescription medications. Mary had still not returned and was not located until the following day. B.L. was admitted to the hospital as an inpatient and released the next day. DCS removed B.L. from Mary's care and placed him with a foster family.

On July 13, 2005, DCS filed a petition alleging B.L. to be a CHINS. The petition listed Walter as the toddler's father and noted that Walter was imprisoned with the DOC. Evidently, however, Walter did not receive notice of the pending hearing on the petition, and he did not attend the August 8, 2005, hearing. At that hearing, Mary admitted that B.L. was a CHINS and the trial court granted DCS's petition. The September 19, 2005, dispositional order listed reunification with Mary as the goal of the proceedings and ordered her to participate in certain services, including counseling and random drug screens. She was also ordered to seek housing and employment.

Facts Relating to Mary

During the year following the CHINS order, Mary was incarcerated and hospitalized intermittently, had unstable living arrangements, and continued to have substance abuse problems. Ex. 6. Additionally, Mary failed to participate fully in the required services. Mary claims that she attended counseling sessions but could offer no evidence that she had done so and could not even remember her therapist's last name. On June 11, 2007, the trial court entered an order noting that Mary had tested positive for cocaine and abused alcohol during the previous ninety days. Id. Mary admitted that she

had purposefully avoided her service providers and failed to submit to drug screens. Tr. p. 229. During the underlying CHINS action, Mary lived in at least four different locations. She entered into a romantic relationship with a man who was physically violent with her and was hospitalized as a result of the violence on at least one occasion. The visitation coordinator testified that Mary often appeared for scheduled visits with B.L. with a black eye and that at other times, Mary's arm was in a brace and she had scratches on her face. Mary testified that Walter was violent with her before they got married in 2003. Id. at 230.

Additionally, Mary's visits with B.L. were inconsistent: in 2005, she missed twelve out of twenty-eight scheduled visits; in 2006, she missed sixteen out of forty-five scheduled visits; in 2007, Mary missed only four of forty-four scheduled visits, but beginning in June 2007, she was late, left early, or was late and left early for sixteen of the scheduled visits. The visitation coordinator testified that there was little bonding between B.L. and his mother and that Mary has an inconsistent parenting style. Id. at 54-55. She also testified that there were times when B.L. struck Mary with a stick and, in response, she struck him in return with the same stick. Id. at 60-61, 73-74.

Facts Relating to Walter

On December 16, 2005, Walter was released from the DOC to the Community Transition Program. Upon Walter's release, he moved into a homeless shelter in Kokomo and has not cohabitated with Mary since his release. On January 11, 2006, Walter had his first visit with B.L. On February 20, 2006, Walter appeared in the CHINS court and a public defender was appointed to represent him.

At some point, Walter moved to Chicago to live with his mother and some other relatives. Walter does not have a driver's license and, as a result, must rely on others for transportation to Kokomo to visit with his son. In 2006, Walter missed twenty-three of thirty-one scheduled visits with B.L., but in 2007, Walter missed only one of thirteen scheduled visits.

At a periodic review hearing on March 13, 2006, Walter requested that B.L. be removed from foster care and placed with him or his mother, Frankie Logan, in Chicago. On June 12, 2006, the trial court ordered DCS to help the family complete an Interstate Compact Placement request. DCS conducted a home study, which recommended placement of B.L. with Frankie but stated that all adults living in the household should undergo national criminal background checks and agree that no corporal punishment could be used on the child. During the months after the home study was completed, none of the adults aside from Frankie submitted to a criminal background check or agreed to refrain from corporal punishment. DCS, therefore, did not recommend that B.L. be placed with Frankie and the trial court did not enter such an order. Similarly, DCS did not recommend that B.L. be placed with Walter, citing the above concerns about Frankie's household, Walter's criminal history, and Mary's allegation of Walter's physical abuse during their relationship as the reasons for its refusal to make the recommendation. In December 2007, Walter moved back to the homeless shelter in Kokomo.

The Termination Proceedings

On August 23, 2007, DCS filed a petition to terminate the respective parental rights of Mary and Walter as to B.L. After conducting a factfinding hearing on January 8 and February 5, 2008, the trial court issued an order terminating the parents' relationships with B.L. on February 18, 2008, finding, in pertinent part, as follows:

32. Mary has a history of instability and substance abuse. . . . Mary also has a history of relationships with abusive partners

33. Mary's parenting skills appear to be limited, and she has shown no improvement in those skills, in part, due to her unwillingness to participate in family services. At visits with [B.L.], Mary shows little ability to bond with the child, or to effectively communicate [with] or control him.

36. Upon his release from incarceration, Walter sought and participated in visits with [B.L.] However, Walter's choice to live in Chicago precluded his participation in family services. . . . Since his release from prison in December 2005, Walter has not maintained steady employment and at the time of the termination hearing, he had had no source of income for sometime [sic].

37. Walter has shown that he has limited parenting skills. When visiting with [B.L.], Walter demonstrates that he does not have the skills or patience to care for a young child.

38. When [B.L.] was removed in July 2005, he was 21 months of age. He was found to have speech and developmental delays, and to be small and fragile. Since in foster care . . . , [B.L.] has participated in First Steps and other programs. He is a happy and healthy child, and now developmentally on target. . . .

39. The DCS case plans in this case have the stated case goal of reunification with the mother Mary. To that end the court has ordered and the DCS offered family educator services, counseling, assistance with housing and employment, and arranged and supervised visitations. However, Mary has not fully participated in such services. Walter was not available to participate in family or reunification

services, first due to his incarceration, and then, until recently, because he lived in Chicago.

43. In the thirty (30) months since [B.L.] was removed from his mother's care, neither parent has shown the ability to provide a consistently stable, safe, and nurturing environment necessary to provide care and custody to their child.

45. In the judgment of the court, neither Mary nor Walter is likely to ever adequately care and provide for [B.L.] consistently as a custodial parent.

47. The court finds it is reasonably probable that the conditions, namely mother's inability to properly care for the child and provide him with a stable and suitable environment, will not be remedied to the degree that she will be able to provide the child with the nurturing, stable, and appropriate care and environment that he requires on a long-term basis. The court further finds that it is reasonably probable that father's inability to provide care and custody for the child will [not] be remedied. . . .

48. The court further finds by clear and convincing evidence that the continuation of the parent-child relationships between Mary and Walter and [B.L.] pose a threat to the well-being of the child. A termination of the parent-child relationships is in the best interest of said child because [B.L.] needs permanency with caregivers who can provide him with a nurturing environment that is secure and free of neglect and meets the child's needs until he reaches the age of majority. Neither parent has demonstrated a past or current ability to provide [B.L.] permanency. . . .

49. The court further finds by clear and convincing evidence that termination of the parent-child relationships . . . is in the best interests of the child, in that further efforts to reunite the parent[s] and child are unlikely to succeed.

Appellant's App. p. 47-53. The parents now appeal.

DISCUSSION AND DECISION

I. Standard of Review

We will not set aside the trial court's judgment terminating a parent-child relationship unless it is clearly erroneous. In re A.A.C., 682 N.E.2d 542, 544 (Ind. Ct. App. 1997). We neither reweigh the evidence nor judge the credibility of witnesses, and we will consider only the evidence that supports the trial court's decision and the reasonable inferences that may be drawn therefrom. Id. If the evidence and the inferences support the trial court's decision, we must affirm. In re L.S., 717 N.E.2d 204, 208 (Ind. Ct. App. 1999).

We acknowledge that the involuntary termination of parental rights is the most extreme sanction a court can impose on a parent because termination severs all rights of a parent to his or her children. Id. Therefore, termination is intended as a last resort, available only when all other reasonable efforts have failed. Id. The purpose of terminating parental rights is not to punish the parents but, instead, to protect their children. Id. Thus, although parental rights are of a constitutional dimension, the law provides for the termination of these rights when the parents are unable or unwilling to meet their parental responsibilities. Id.

To effect the involuntary termination of a parent-child relationship, the State must present clear and convincing evidence establishing the following elements:

- (A) one (1) of the following exists:
 - (i) the child has been removed from the parent for at least six (6) months under a dispositional decree;
 - (ii) a court has entered a finding under IC 31-34-21-5.6 that reasonable efforts for family preservation or reunification

are not required, including a description of the court's finding, the date of the finding, and the manner in which the finding was made; or

- (iii) after July 1, 1999, the child has been removed from the parent and has been under the supervision of a county office of family and children for at least fifteen (15) months of the most recent twenty-two (22) months;

(B) there is a reasonable probability that:

- (i) the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied; or
- (ii) the continuation of the parent-child relationship poses a threat to the well-being of the child;

(C) termination is in the best interests of the child; and

(D) there is a satisfactory plan for the care and treatment of the child.

Ind. Code § 31-35-2-4(b)(2).

In construing this statute, this court has held that when determining whether certain conditions that led to the removal of the children will be remedied, the trial court must judge the parent's fitness to care for the children at the time of the termination hearing, taking into consideration evidence of changed conditions. In re D.J., 755 N.E.2d 679, 684 (Ind. Ct. App. 2001). A parent's habitual pattern of conduct must also be evaluated to determine the probability of future negative behavior. Id. The trial court need not wait until a child is irreversibly harmed such that his physical, mental, and social development are permanently impaired before terminating the parent-child relationship. Id.

Additionally, the trial court may consider the services offered as well as the parent's response to those services. Id. Parental rights may be terminated when parties are unable or unwilling to meet their responsibilities. Ferbert v. Marion County OFC, 743 N.E.2d 766, 776 (Ind. Ct. App. 2001). Also, when determining what is in the best interests of the children, the interests of the parents are subordinate to those of the child. Id. at 773. Thus, parental rights will be terminated when it is no longer in the child's best interests to maintain the relationship. In re B.D.J., 728 N.E.2d 195, 200 (Ind. Ct. App. 2000).

II. Walter's Due Process Rights

Walter argues that his procedural and substantive due process rights were infringed upon during the course of these proceedings. Specifically, he argues that DCS's failure to notify him of the initial CHINS hearing and failure to offer him the opportunity to participate in services designed to reunify him with B.L. violated his due process rights.

It is undisputed that, for an unknown reason, Walter was not notified of and did not attend the initial hearing on the CHINS petition. At that hearing, Mary admitted and the trial court found that B.L. was a CHINS. Initially, we note that Walter failed to raise this issue before the trial court. Consequently, he has waived the argument. See McBride v. Monroe County Office of Family & Children, 798 N.E.2d 185, 195-96 (Ind. Ct. App. 2003) (holding that a procedural due process argument is waived if raised for the first time on appeal).

Waiver notwithstanding, we note briefly that even if Walter had been notified and appeared at the hearing, he could not have assumed the responsibility to care for B.L., inasmuch as he was incarcerated at that time. And to the extent that he argues that B.L. could have been placed with Walter's family members, we note that during the CHINS proceedings, DCS evaluated Walter's mother and other relatives and declined to recommend placement with them.¹ Therefore, even if Walter had been present at the hearing, nothing in the record indicates that the result—that B.L. was declared a CHINS—would have been any different. Furthermore, we note that although Walter was not involved in the proceeding from the outset, he did learn of its existence, requested and was appointed counsel, and took part in the proceedings for a year and a half before the termination petition was filed. See Hite v. Vanderburgh County Office of Family and Children, 845 N.E.2d 175, 184 (Ind. Ct. App. 2006) (holding that even though father was not notified of the initial stages of the CHINS action, he was not deprived of due process “because Father was not denied the opportunity to be heard in the latter portions of the CHINS action and in the termination proceedings” and, therefore, “the failure to provide Father with notice . . . [did not] substantially increase[] the risk of error in the termination proceedings”). Under these circumstances, we cannot conclude that Walter's procedural due process rights were violated.

¹ If there are other family members with whom B.L. could have been placed, Walter does not offer specific information about them and did not make an offer to prove at the hearing. Consequently, we can rely only on the information in the record about Frankie and the other relatives living with her in Chicago.

Walter next argues that DCS's failure to offer him services during the CHINS action violated his substantive due process rights. The goal of the CHINS proceeding was always the reunification of B.L. and Mary, B.L.'s caregiver prior to his removal. Walter never requested that the goal be changed. Furthermore, the trial court in the CHINS action ordered that "upon father's release from the DOC, services will be provided to him upon his request." Ex. 6. Walter requested visitation with B.L. and a home study of Frankie's residence in Chicago, both of which were arranged by DCS. He requested no other services. Moreover, he moved to Chicago and has offered no evidence that DCS would have been able to arrange services for him in an out-of-state location. Although it may have been a better course of action for DCS to have been more proactive in offering services to Walter, under these circumstances, we cannot find that Walter's substantive due process rights were violated.

III. Sufficiency of the Evidence

A. Mary

Mary's sole argument on appeal is that DCS failed to offer sufficient evidence that termination of the parent-child relationship is in B.L.'s best interests. We cannot agree. At the hearing, DCS presented evidence establishing that during the year following the CHINS order, Mary was incarcerated and hospitalized intermittently, had unstable living arrangements, and continued to have substance abuse problems. Ex. 6. Moreover, Mary failed to participate fully in the required services. Additionally, Mary used cocaine, abused alcohol, and admitted that she had purposefully avoided her service providers and failed to submit to drug screens. Id.; Tr. p. 229. During the pendency of the CHINS

action, she lived in at least four different locations and entered into a romantic relationship with a man who was physically violent with her. Finally, Mary's visitations with B.L. were inconsistent, and during their visits together, there was little bonding between B.L. and his mother and the visitation coordinator observed Mary's limited parenting skills. Although Mary directs our attention to other evidence in the record, this amounts to a request that we reweigh the evidence and assess witness credibility—a practice in which we do not engage when evaluating the termination of a parent-child relationship. We find that there is sufficient evidence supporting the trial court's conclusion that the termination of the relationship between Mary and B.L. is in the child's best interests.

B. Walter

Walter argues that there is insufficient evidence supporting the trial court's conclusions that the conditions that resulted in the child's removal would not be remedied² and that termination of the parent-child relationship is in B.L.'s best interests.

Turning first to the conditions resulting in B.L.'s removal, we observe that those conditions included Mary's neglect and the fact that neither of his parents had a suitable residence to house the boy. In considering this statutory element, the court should judge

² Walter also argues that there is insufficient evidence supporting a conclusion that the continuation of the parent-child relationship posed a threat to B.L.'s well being. Inasmuch as we find herein that the trial court properly concluded that the conditions resulting in B.L.'s removal would not be remedied and DCS needs to prove only one of these statutory elements, we need not consider whether continuation of the relationship posed a threat to B.L.'s well being. See In re Termination of Parent-Child Relationship of A.B., 888 N.E.2d 231, 236 (Ind. Ct. App. 2008) (observing that Indiana Code section 31-35-2-4(b)(2)(B) is written in the disjunctive and "therefore requires the juvenile court to find only one of the two requirements of subsection (B) by clear and convincing evidence").

the parents' fitness to care for their child at the time of the termination hearing. In re W.B., 772 N.E.2d 522, 530 (Ind. Ct. App. 2002). Additionally, the court must weigh the parents' habitual patterns of conduct to determine the long-term effect of any short-term improvements. Id.

At the time of B.L.'s removal, Walter was incarcerated with the DOC. Although he has since been released, there is no evidence that circumstances have changed such that he is able to provide a suitable home for B.L. At the time of the termination hearing, Walter was residing in a homeless shelter in Kokomo. Before that time, he was living with family members in Chicago, some of whom refused to undergo a required criminal background check and refused to agree that corporal punishment would not be used on B.L. DCS concluded, based on those refusals, that Walter's mother's residence was not a suitable home for the boy. Under these circumstances, we find that there is sufficient evidence supporting a conclusion that the conditions resulting in B.L.'s removal—namely, the parents' inability to provide a suitable home—would not be remedied.

As for whether termination of the relationship is in B.L.'s best interests, we note that in addition to Walter's failure to provide a suitable home for the child, DCS presented evidence that he had failed to maintain steady employment and that at the time of the hearing, Walter had no source of income whatsoever. Furthermore, Walter has limited parenting skills, does not have sufficient patience to parent a young child, and inconsistently participated in scheduled visits with his son. Finally, Mary testified that Walter was physically violent with her during their romantic relationship. Tr. p. 230. We find this evidence to be sufficient to support the trial court's conclusion that

termination of the parent-child relationship of Walter and B.L. is in the child's best interests.

The judgment of the trial court is affirmed.

MATHIAS, J., and BROWN, J., concur.